No. 93-1881

In The

Supreme Court of the United States

October Term, 1994

DENNIS RUARK, SR. and MARY RUARK,

Petitioners,

vs.

LELAND BOATWRIGHT, GREGG REED, and ROBERT COMER,

Respondents.

On Petition For Writ of Certiorari to The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF PETITIONERS

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REASONS FOR GRANTING THE WRIT

I. The Holding of the Court of Appeals Should be Reexamined by that Court in Light of this Court's Clarification of the Meaning of the Phrase "Deliberate Indifference."

On April 4, 1994, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's summary judgment for Respondents. On May 25, 1994, Petitioners filed their Petition for Writ of Certiorari with this Court. In their Petition they claimed, *inter alia*, that the opinion of the Eighth Circuit improperly applied the deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97 (1976), to the instant cause. They further argued that the phrase "deliberate indifference" "evades rather than expresses precise meaning." *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). They concluded that the imprecision of the phrase had led to generalized confusion in the lower courts as to what was meant by "deliberate indifference" so as to warrant granting their Petition.

On June 24, 1994, Respondents filed their Brief in Opposition to Petition for Writ of Certiorari. In their Brief Respondents argue that granting of the writ would be inappropriate because there is no inconsistency in the holdings of the various circuits (Respondents' Brief at 5-6).

When they filed their Brief, Respondents were apparently unaware of the Opinion of this Court in *Farmer v. Brennan*, ___ U.S. ___, 62 U.S.L.W. 4446, handed down on June 7, 1994. In that Opinion this Court noted that it had granted certiorari "because Courts of Appeals had

adopted inconsistent tests for 'deliberate indifference.' " 62 U.S.L.W. at 4448. The Court therefore undertook for the first time "to define the term 'deliberate indifference. . . . ' " *Ibid.*, at 4447.

In formulating a test for deliberate indifference, the Court reviewed the evolution of the phrase since *Estelle v. Gamble* was decided. The Court noted that while deliberate indifference means something more than mere negligence, it is satisfied by something less than acts or omissions "for the very purpose of causing harm or with knowledge that harm will result." 62 U.S.L.W. at 4449. Although lower courts have routinely equated deliberate indifference with recklessness, it was unclear whether the kind of recklessness necessary to offend Constitutional minima was that encompassed by the civil law or by the criminal law. The former calls a person reckless who acts or fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known, 62 U.S.L.W. at 4449. In contrast the criminal law only permits a finding of recklessness when a person disregards a risk of harm of which he or she is aware. *Ibid.*

In *Farmer* this Court opted for the subjective test of recklessness found in the criminal law:

> We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a

> substantial risk of serious harm exists, and he must also draw the inference.[1]

62 U.S.L.W. at 4449. The Court noted that this approach comported with the criminal law approach to recklessness which "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Ibid.* The Court concluded that "subjective recklessness as used in the criminal law is a familiar and workable standard . . . , and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Ibid.*, at 4450.

This Court acknowledged the concern that the subjective tests of recklessness might lead prison officials to simply ignore obvious dangers to prisoners, 62 U.S.L.W. at 4450. It went on to discount that concern:

> Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.
>
> * * *
>
> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . *and a factfinder may conclude that a*

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[1] Although *Farmer* is a prison conditions case, the same test – deliberate indifference – applies in cases involving the failure to attend to a prisoner's medical needs, *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

> *prison official knew of a substantial risk from the very fact that the risk was obvious.*[2]

(Emphasis added.) *Ibid.*, at 4450-4451.

Applying the teaching of *Farmer* to the case *sub judice*, it quickly becomes apparent that Petitioners adduced sufficient evidence that Comer acted recklessly. If it is assumed that at 6:15 a.m. Comer saw Ruark choking (App. 106), saw brown fluid running from the corners of Ruark's mouth (App. 158), could not awaken him (App. 158), and saw that he was having obvious difficulty breathing (App. 157-158), then Comer's conduct satisfied the subjective recklessness test announced in *Farmer;* that is, the evidence would permit a finding that Comer disregarded "a risk of harm of which he [was] aware." 62 U.S.L.W. at 4449. Even if Comer claimed that he was unaware of the consequences that can befall someone who is choking and having difficulty breathing – something Comer has never claimed in the course of this litigation – the issue of whether Comer "had the requisite knowledge of a substantial risk *is a question of fact* subject to demonstration in the usual ways, including inference from circumstantial evidence. . . . " *Ibid.*, at 4451. (Emphasis added.) In the instant cause a factfinder could conclude that Comer "knew of a substantial risk from the very fact that the risk was obvious." *Ibid.*

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[2] This Court goes on to cite 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.7, at 335 (1986), for the proposition that: "If the risk is obvious, so that a reasonable man would realize it, we might well infer that [the defendant] did in fact realize it. . . . " Cited at 62 U.S.L.W. at 4451.

The foregoing is even more compelling as to Reed and Boatwright. Comer testified that he summoned Reed at 6:30 when he again tried to awaken Ruark and again saw that Ruark was having obvious difficulty breathing, with brown fluid dripping out of his mouth (App. 164). Reed was only about 30 to 40 feet away at that time and came immediately upon being called by Comer (App. 165-166). When Reed looked at Ruark, he observed his labored breathing (App. 212) and saw brown fluid running from his nose and mouth, pooling on the floor below (App. 214). Given his previous training as a paramedic, Reed immediately became concerned for Ruark's safety at 6:30 and hurried to the Sheriff's office which was located about 65 feet from where Ruark lay dying (App. 215-216, 314-315). Reed knew the serious consequences that can attend an obstructed airway (App. 215-217), and for that reason he claims he hurried to the Sheriff's office and told Sheriff Boatwright of the problem Ruark was experiencing so that outside medical help could be summoned (App. 215-216). Despite Reed's claim that he hurried to get help at 6:30, it is uncontroverted that no call was made for an ambulance until 6:51 (App. 91). Reed admits that he was aware of the need to act quickly to save Ruark's life; he merely denies that he was responsible for the delay by Sheriff Boatwright in calling for an ambulance.

Sheriff Boatwright testified that as soon as Reed told him of a problem with Ruark, he had an ambulance called (App. 363). He did this because he knew that immediate action was needed to protect Ruark (App. 368). Sheriff Boatwright, like Reed, knew that if someone was having problems breathing, that person could die (App. 293). For

that reason Sheriff Boatwright admitted that he knew it would be wrong to wait 20 minutes before calling an ambulance for someone (like Ruark) who was having difficulty breathing (App. 374).

If a jury in this case believed Reed when he says he hurried to the Sheriff at 6:30 to seek help for Ruark, then Sheriff Boatwright was responsible for the 20 minute delay before an ambulance was finally called at 6:51. On the other hand if a jury believed Sheriff Boatwright when he testified that an ambulance was called just as soon as he was notified of Ruark's condition, then a jury could reasonably infer that Reed delayed seeking help for 20 minutes until 6:51 (when jail records show the call for help went out). In either event there is no question but that the person responsible for the delay "disregard[ed] a risk of harm of which he [was] aware." 62 U.S.L.W. at 4449.

In light of the test articulated in *Farmer*, the Eighth Circuit should be given the opportunity to reexamine its opinion.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari, vacate the judgment of the lower court, and remand this case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Farmer v. Brennan, supra.*

Respectfully submitted,

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